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IN THE
Supreme Court of the United States

October Term, 1977

No. 77-478

COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners

v.

UNITED STATES, et al.,
Respondents

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia

**BRIEF OF RESPONDENT-INTERVENOR
CONSOLIDATED RAIL CORPORATION
IN OPPOSITION**

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November 8, 1977

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CONSOLIDATED RAIL CORPORATION
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Consolidated Rail Corporation (Conrail) respectfully
submits this Brief in opposition to the petition of the Com-
monwealth of Pennsylvania and Pennsylvania Public
Utility Commission (Pennsylvania).

(1)

OPINION BELOW

The order of the U.S. Court of Appeals discussing the review proceeding, not reported, is printed in Appendix A, p. 1a, to the petition herein. The review proceeding alleged error in one aspect of the October 29, 1976 report and order of the Interstate Commerce Commission in its I&S Docket No. 9108, *Cancellation of TOFC Service, Consolidated Rail Corporation*, not yet reported, printed in Appendix E, pp. 9a-58a, to the petition herein. A subsequent ICC order of February 2, 1977 in that case which made the review proceeding moot, not yet reported, is printed in Appendix F, pp. 59a-66a, to the petition herein.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court, pursuant to 28 USC 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in granting the motion of the petitioners before it to dismiss as moot a petition for judicial review of an order of the Interstate Commerce Commission over the objection of a party which became an intervenor after the motion to dismiss was filed.

STATEMENT OF THE CASE

Corning Glass Works and Thatcher Glass Manufacturing Company (Elmira interests) instituted the proceeding below by filing in the Circuit Court of Appeals for the District of Columbia a joint petition for judicial review of an October 29, 1976 order of the Interstate Commerce Commission. That petition asserted that the Commission order was invalid insofar as it allowed Conrail to discontinue Trailer-On-Flat-Car (TOFC) service at Elmira, N.Y.

On February 2, 1977, the Commission served another order which required restoration of TOFC service at Elmira. Therefore, on February 18, the Elmira interests moved to dismiss the proceeding on the ground that the Commission had provided the relief requested in the court action, thus making their petition for review moot (App. A). The Court of Appeals granted that motion. The order granting the motion to dismiss is the order or judgment which the petitioners here (Pennsylvania) seek to reverse.

Pennsylvania sought to become party to the proceeding in the court below by filing a petition to the Circuit Court for leave to intervene on February 3, 1977.¹ That petition for leave to intervene was granted on February 23, 1977. Thus, Pennsylvania did not become an intervenor until after the Elmira interests had filed their motion to dismiss as moot.

Pennsylvania has instituted a separate proceeding in the Circuit Court of Appeals for the District of Columbia for review of the same order of the ICC that was before the Court of Appeals in the case below, No. 77-1147 (D.C. Cir.), *Commonwealth of Pennsylvania v. I.C.C.* That other case has been briefed and is pending before the

1. That petition for leave to intervene was filed more than 30 days after the proceeding was instituted and therefore was late filed, in violation of F.R.A.P. 15(d).

Court of Appeals. In that case, the respondents and intervenors in support of respondents urge the Court of Appeals to dismiss the petition on the ground that it was not timely filed within the 60-day limitation of the Hobbs Act, 28 USC 2344, and on the further ground that the Commission order is valid in all respects. Pennsylvania has argued to the contrary on both issues.

ARGUMENT

This proceeding does not present an important question which warrants review by this Court.

Petitioners' strained argument (Brief, pp. 11-13), that the effect of the unpublished order which dismissed the proceeding below will encourage use of the form of review contained in 28 USC 2344 and therefore cause a "sea of paperwork" in the Court of Appeals, is an outstanding example of hyperbole which reveals the lack of merit in the petition.

Petitioners do not cite any opinion that is in conflict with the action of the Circuit Court of Appeals in granting the motion for dismissal which was made by the party which instituted the proceeding. Moreover, none of the cases cited by petitioners deal with the rights of a party which was allowed to intervene *after* the petitioner below had sought dismissal on the grounds of mootness.

Even if it be true, as argued by petitioners, that the trend of the decisions is not to restrict intervenors to the issues raised by the parties that instituted the proceeding (Ptn., p. 14), the cases cited to show this trend² do not hold that a proceeding cannot be dismissed as moot at the request of the party which brought the case. The two cases cited by petitioners which involved proceedings to set aside orders of the Interstate Commerce Commission³ dealt with issues raised by intervenors, as well as the party

2. *Spangler v. United States*, 415 F.2d 1242, 1245 (9th Cir. 1969), vac. other grd's sub nom. *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 427 (1976); *Stewart-Warner Corp. v. Westinghouse Electric Corp.*, 352 F.2d 822, 827 (2d Cir. 1963); *New York Central Railroad Company v. United States*, 200 F. Supp. 944, 948-50 (S.D. N.Y. 1961); *Auto Workers v. Scofield*, 382 U.S. 205 (1965); *United States v. Bursey*, 515 F.2d 1228 (5th Cir. 1975)

3. *Widing Transp., Inc. v. I.C.C.*, 545 F.2d 654, 656 (9th Cir. 1976); *Chem-Haulers, Inc. v. United States*, 536 F.2d 610 (5th Cir. 1976)

that instituted the proceeding. In each of those cases, the Commission order was sustained. Neither of those cases specifically dealt with the question of what issues can be raised by intervenors. Each of those cases was prosecuted to conclusion by the parties which instituted the case. Thus, they do not deal with the unusual and unique procedural question that was presented by the motion to dismiss on the grounds of mootness. Those cases are not in conflict with the action of the court below.

Penn Central Merger Cases, 389 U.S. 486 (1968), also cited by petitioner is not pertinent here. The lower court order which was sustained by this court in that case was entered for the sound purpose of preventing a multiplicity of litigation regarding the Commission's merger and inclusion decisions. It does not hold that an intervenor may require a case to be continued over the objection of the party that commenced the action.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 8, 1977

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-2153

CORNING GLASS WORKS and
THATCHER GLASS MANUFACTURING COMPANY,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

Motion to Dismiss Petition for Review

Come now Petitioners Corning Glass Works and Thatcher Glass Manufacturing Company and move the Court to dismiss their Petition for Review for the following reasons:

Petitioners instituted this action seeking review of the Commission's, Division 2's, Report and Order served on or about October 29, 1976, in Investigation and Suspension Docket No. 9108, *Cancellation of TOFC Service, Consolidated Rail Corporation*, which found, as pertinent herein, that ConRail's proposed cancellation of TOFC service at Elmira, New York, was shown to be just and reasonable.

On or about November 17, 1976, Petitioners filed separate petitions with the Commission seeking reconsideration of Division 2's above Report and Order. However, because Section 303(h) of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, which

amends Section 17 of the Interstate Commerce Act, 49 U.S.C. § 17, provides that ". . . any decision, order, or requirement of the Commission, or of a duly designated division thereof, shall be final on the date on which it is served . . .", Division 2's Report and Order was considered administratively final and ripe for judicial review. Accordingly, on December 27, 1976, Petitioners filed their petition requesting this Court to review said decision.

In a Report and Order served on February 2, 1977, in Investigation and Suspension Docket No. 9108 (Complaint), *Cancellation of TOFC Service, Consolidated Rail Corporation*, the full Commission, treating the petitions filed on or about November 17, 1976, as complaints, found that the cancellation of TOFC service at Elmira, New York, was unlawful under Sections 1(4), 1(5)(a) and 1(6) of the Interstate Commerce Act, 49 U.S.C. §§ 1(4), 1(5)(a) and 1(6). Pursuant to the terms of that Order, ConRail restored TOFC service at the Elmira ramp on or about February 15, 1977.

This subsequent Commission action has provided Petitioners the relief they were seeking in the instant action before this Court. It therefore appears that Petitioners' interest in the instant action has been mooted.

Wherefore, Petitioners move the Court to dismiss their Petition for Review.

Respectfully submitted,

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Dated: February 18, 1977